

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

11 BENITO CHAVEZ VALADEZ and JORGE) 3:15-cv-00533-HDM-WGC
12 PALACIOS,)
13 Plaintiffs,) ORDER
14 vs.)
15 STEPHEN A. STUART, MARIT)
16 ZIMMERMAN, WALTER L. HAITH, AL)
17 GELLMANN, JEH JOHNSON, and THE)
18 U.S. DEPARTMENT OF HOMELAND)
SECURITY,)
Defendants.)
_____)

19 Each plaintiff has pending before the Reno office of the U.S.
20 Citizenship and Immigration Services ("USCIS") a Form I-485
21 application for adjustment of status. Plaintiffs assert that
22 defendants have indicated they intend to deny the applications
23 because some of their prior re-entries were not documented with
24 either a stamp or a Form I-94. Plaintiffs argue that this
25 requirement violates applicable standards. On October 27, 2015,
26 plaintiffs filed a complaint seeking a writ of mandamus compelling
27 defendants to process their applications without requiring a Form
28 I-94 or a stamp. Plaintiffs' claims are asserted under 5 U.S.C. §

1 701 *et seq.* (the Administrative Procedures Act ("APA")), 28 U.S.C.
2 § 1361 (writ of mandamus), and 8 U.S.C. § 1255 (adjustment of
3 status). Plaintiffs also invoke the court's jurisdiction under 28
4 U.S.C. §§ 1331 and 2201, neither of which provides a stand-alone
5 claim for relief. Defendants have moved to dismiss the complaint
6 (#6). Plaintiffs have opposed in part (#7), and defendants have
7 replied (#8).

8 Initially, defendants moved to dismiss for failure to perfect
9 service of process, arguing that plaintiffs did not serve the
10 Attorney General as required under Federal Rule of Civil Procedure
11 4(i)(1)(B). However, plaintiffs in response provided evidence that
12 they served the Attorney General via certified mail, as required by
13 the rule. (See Opp'n Exs. 1-6). Defendants do not rebut this
14 evidence. Accordingly, plaintiffs have perfected service of
15 process as required by Rule 4.

16 Defendants also moved to dismiss plaintiffs' APA claim because
17 there has been no final agency action and plaintiffs' claim for
18 unlawful delay because the complaint fails to state such a claim.
19 Plaintiffs concede that both claims should be dismissed.

20 Plaintiffs' petition for a writ of mandamus seeks to compel
21 defendants to process their applications without requiring a stamp
22 or Form I-94. Under 28 U.S.C. § 1361, the court has "original
23 jurisdiction of any action in the nature of mandamus to compel an
24 officer or employee of the United States or any agency thereof to
25 perform a duty owed to the plaintiff." Defendants argue that the
26 court lacks subject matter jurisdiction over this claim because
27 applications for adjustment of status are committed to USCIS's
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1 discretion.¹ (Mot. 4-5 & n.2); 8 U.S.C. § 1255; §
 2 1252(a)(2)(B)(ii). Plaintiffs respond that defendants do not have
 3 discretion to ignore applicable standards and that doing so would
 4 violate a nondiscretionary duty. It is clear from the record that
 5 defendants have not ignored or misapplied any nondiscretionary
 6 standards because they have not yet adjudicated plaintiffs'
 7 applications.² See *In re Freeman*, 489 F.3d 966, 968 (9th Cir.
 8 2007) (holding petition for writ of mandamus regarding adjustment
 9 of status application premature for appellate review). Therefore
 10 any claim plaintiffs may have has been raised prematurely in
 11 plaintiffs' complaint for a writ of mandamus.

12 Finally, defendants argue that plaintiffs' claim under § 1255
 13 – which governs adjustment of status – fails because § 1255 does
 14 not confer jurisdiction on the court and, in fact, under 8 U.S.C. §
 15 1252(a)(2)(B)(I) the court lacks jurisdiction to review adjustment-
 16 of-status determinations. *Hassan v. Chertoff*, 543 F.3d 564, 566-67
 17 (9th Cir. 2008). The Ninth Circuit has held that while the court
 18 may not review adjustment-of-status determinations based on
 19 discretionary grounds, decisions made on nondiscretionary grounds
 20 are subject to review. *Mamigonian v. Biggs*, 710 F.3d 936, 943-45

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 22 ¹ Plaintiffs assert that defendants did not move to dismiss the
 23 mandamus claim, but that is not correct. They did. (Mot. 5 n.2).
 24 Defendants assert in reply that plaintiffs did not respond to the motion to
 25 dismiss the mandamus claim, but that is not correct. They did. (Opp'n 3-
 26 4).

27 ² While mandamus may sometimes be appropriate prior to adjudication of
 28 an adjustment-of-status application, such circumstances arise when USCIS has
 unreasonably delayed processing an application. See *Khan v. Johnson*, 65 F.
 Supp. 3d 918, 924-25 (C.D. Cal. 2014). Mandamus in such cases is based on
 a finding that USCIS has a statutory duty to process pending adjustment
 applications within a reasonable period of time, and that by failing to do
 so it has ignored a nondiscretionary duty. Plaintiffs here are not claiming
 an unlawful delay in the processing of their application.

1 (9th Cir. 2013). However, even assuming the standards at issue
2 here are nondiscretionary, such review would be pursuant to the APA
3 and thus the court could review only final agency action. See *id.*
4 at 945. Plaintiffs concede there has not been any final agency
5 action in their cases. Therefore, the court agrees with defendants
6 that the complaint cannot proceed on any claim under § 1255.

7 In accordance with the foregoing, the defendants' motion to
8 dismiss (#6) is **GRANTED**, and plaintiffs' complaint is hereby
9 **DISMISSED WITHOUT PREJUDICE**.

10 IT IS SO ORDERED.

11 DATED: This 9th day of March, 2016.

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14 UNITED STATES DISTRICT JUDGE
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